SUPREME COURT, U. S.

FILED

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 644

JACOB J. FROHMANN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

Jacob J. Frohmann prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above styled case on July 27, 1967, affirming the judgment of the United States District Court for the Eastern District of Missouri, Eastern Division and the sentence of imprisonment of Petitioner for violation of 26 U. S. C., Section 7203. On August 24, 1967, the Court of Appeals denied a petition for rehearing.

CITATION TO OPINION BELOW.

The judgment of the United States Court of Appeals is printed in Appendix A, infra. The opinion of the United States Court of Appeals is also printed in Appendix A, infra, and is reported at 29 AFTR, par. 5244.

JURISDICTION.

Petitioner was tried and convicted in the United States District Court for the Eastern District of Missouri, Eastern Division on both counts of a two count information, each charging him with violation of 26 U. S. C., Section 7203. The District Court entered judgment and sentenced him to one year imprisonment on each count to run concurrently. On July 27, 1967, the Court of Appeals for the Eighth Circuit entered its judgment affirming the judgment of the District Court. On August 24, 1967, the Court of Appeals denied a petition for rehearing. Petitioner invokes the jurisdiction of this Court to review the opinion and judgment of the Court of Appeals by a writ of certiorari under 28 U. S. C., Section 1254 (1).

STATUTES INVOLVED.

Title 26, U. S. C., Section 7203.

Willful Failure to File Return, Supply Information, or Pay Tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply

such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

Federal Rules, Criminal Procedure 52 (b), 28 U. S. C. A.

Harmless Error and Plain Error.

(b) **Plain Error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Constitution of the United States Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

QUESTIONS PRESENTED.

I.

Whether the testimony of a government witness Revenue Agent, admitted over petitioner's objection, of the statement and admission of the petitioner as to why he had failed to file income tax returns, constituted evidence obtained against him in violation of petitioner's

constitutional right against self-incrimination, such statement having been obtained under questioning by a Special Agent of the Internal Revenue Service after the matter had been referred to the intelligence unit but without petitioner's knowledge that he was under criminal investigation.

II.

Whether, under all of the circumstances of the case, petitioner was substantially prejudiced and denied a fair and impartial trial considering the actions and rulings of the trial judge in excluding evidence offered by petitioner in his own defense and to meet the government's evidence, and in asking questions of petitioner's witness in such a way as to express his opinion on a vital issue of the case.

III.

Whether or not 26 U. S. C., Section 7203 under which defendant was convicted is invalid as being in violation and contravention of the right against self-incrimination guaranteed by the Fifth Amendment to the Constitution.

STATEMENT.

(All references are to pages in the typewritten transcript of the proceedings in the District Court duly certified by the Court of Appeals, unless otherwise noted.)

Petitioner was convicted in a jury trial on both counts of an information charging him, respectively, with wilful failure to file an income tax return for the year 1959, although having a gross income of $54,194.44, and of wilful failure to file an income tax return for the year 1960, although having a gross income of $35,830.47, both counts in violation of 26 U. S. C., Sec. 7203.

Petitioner was engaged in the business of developing and dealing in commercial real estate properties.

Government witnesses identified petitioner's tax returns for the years 1958 through 1964, and the returns for 1959 through 1962 were received in evidence (Tr. 15). These witnesses, employees of Internal Revenue Service, testified to taxpayer's complete history, including dates of filing, assessment and payments for the years 1950 through 1964 and the fact that returns for the years 1958 through 1964 were delinquent (Tr. 28, 29, 30).

The Government called approximately 33 additional witnesses who testified concerning their business transactions with petitioner and introduced numerous documents relating to these transactions. Petitioner's bank ledger from December, 1958 through February, 1962 was introduced (Tr. 258).

Revenue Agent Parker first contacted petitioner on July 29, 1961 (Tr. 291) and requested records from which he could determine his income for the years 1958, 1959 and 1960 (Tr. 293). A Mr. Kuehn came to Parker's office and said he was a lawyer representing petitioner and filed the 1958 return in July, 1962 (Tr. 296). Kuehn delivered petitioner's records to Parker.

The matter was referred to the intelligence unit, leading to a meeting on August 16, 1962 at which petitioner told a Special Agent he failed to file his returns because he did not have the money to pay the tax (Tr. 296, 297, 298, 299). Testimony concerning this statement is the basis for point I. of this petition.

Special Agent Noelker testified to a summary showing that petitioner's gross income for 1959 was $55,502.41 (Tr. 334) and for 1960 his gross income was $36,522.50. Petitioner's 1960 return introduced by the Government without limitation showed a loss of $50,362.63. Special

Agent Noelker testified as to the reasons and respects in which petitioner's return was incorrect (Tr. 349).

Petitioner's accountant was not permitted to testify as to the details of the computations used in the return or to show why such computations were used. This question remains an issue in this case under point II.

Petitioner was born in 1910 of uneducated immigrant parents who spoke little English. He completed only the fifth grade of school at age 16, having been returned to the old country and apprenticed in a dry goods store for five years. He was a barber until becoming interested in the real estate business in the 1930's and about 1940 began dealing in real estate for his own account in a small way. He has never held a broker's license.

Petitioner always worked out of his home except when he had desk space in the real estate office of Government witness Brinkop between 1955 and 1963. He had never kept books and his only records were the papers of a transaction which he would keep together, and starting in 1950 a Mr. Kuehn, whom he had known in the real estate business, prepared his returns. As his transactions became more complicated, he still failed to keep any books or change his method of keeping records (Tr. 487, 488).

If petitioner had income property, it was always managed by someone else. He did not prepare one single document in connection with the transactions mentioned in evidence. Government witness Brinkop, with whom petitioner had desk space for eight years, said he never saw petitioner do so much as write a letter and that although he had an unusual ability to remember matters connected with real estate, petitioner had no knowledge of any other transactions in the world (Tr. 255).

Petitioner attempted to introduce the Court files in three civil suits against him in which very substantial judgments were taken against him by default, such evi-

dence being offered to show a habit of neglect of other matters of importance to him and his lack of the business acumen claimed by the Government (Tr. 425, 426, 427). The refusal of the trial Court to admit this evidence is considered in the issue raised under point II.

REASONS FOR GRANTING THE WRIT.

I.

The Court below has held that the statement of petitioner as to why he failed to file his income tax returns under interrogation of a Special Agent of the Internal Revenue Service was not obtained in violation of petitioner's constitutional rights under the Fifth Amendment and was admissible in evidence.

This decision is in conflict with the principles of law respecting waiver of constitutional rights as set forth by this Court in the cases of Miranda v. Arizona (1966), 384 U. S. 436 and in Escobedo v. Illinois (1964), 378 U. S. 478.

Certainly, there is an important question of Federal law which has not been but should be settled by this Court. Apparently, it was for the latter reason that Mr. Justice Douglas urged the granting of a petition for certiorari upon this question in his dissent to the denial of certiorari in the case of Thomas v. United States (1967), 386 U. S. 975.

Although on the facts no Circuit Court of Appeals has yet extended the protection of the Fifth Amendment to non-custodial questioning, there does appear in the various opinions to be a distinction arising as to the application of the Escobedo-Miranda rule indicating the need and desirability of a determination of the question by the Supreme Court.

For example, in Kohatsu v. United States (9 Cir. 1965), 351 F. 2d 898 the opinion refused to extend the Escobedo rule on the grounds that the investigations of the Revenue Agents at that point were to determine whether, in fact, any crime had been committed and while so engaged, the accusatory stage had not yet been reached. Similarly, in the instant case, the opinion of the Eighth Circuit sets out under point B that,

> "* * * we are not satisfied, either, that this record shows that the investigation had attained what is described as the accusatory stage * * *".

In so doing, both the Ninth Circuit and the Eighth Circuit have indicated that the accusatorial stage requiring procedural safeguards may be reached in a non-custodial situation.

On the other hand, in United States v. Maius (6 Cir. 1967), 378 F. 2d 716 the Sixth Circuit indicates that it would require an in-custody interrogation and makes no mention of the question of the accusatory stage as a guideline. It is worthy of note also that at p. 719 of the Maius opinion, the Court indicates its feeling that existing procedures of the Internal Revenue Service might be unfair but that,

> "* * * Until we are told by superior authority that a citizen's constitutional rights are imperiled by such procedure, we are constrained to hold that the evidence is admissible. * * *"

Several of the District Courts have applied the Miranda rule to tax cases indicating by comments that there is judicial concern of the unfairness of denying a taxpayer constitutional safeguards afforded to perpetrators of violent crimes. United States v. Turzynski, 67-2 USTC, par. 9489 (N. D. Illinois 1967); United States v. Kingry, 67-1 USTC, par. 9262 (N. D. Florida 1967).

The essence of the legal principle of Miranda and Escobedo is that a waiver of constitutional rights is fundamental with respect to the Fifth Amendment privilege and requires an intelligent and free choice based upon knowledge. See Miranda v. United States, 384 U. S. at p. 476. The rule was then applied on the facts to in-custody interrogations.

In the instant case, petitioner had no knowledge that his case had moved from a routine tax to a criminal investigation (Tr. 483, 484) and there was no evidence to the contrary. Such knowledge of the nature of the proceeding, which is certainly an adversary proceeding, is essential to a free and intelligent choice. By analogy, failure to furnish the taxpayer with such information is akin to the concealment of a material fact upon which, in civil law, a contract may be avoided as lacking essential consent.

In this case and others with similar facts, the Courts of Appeals have found a waiver of constitutional rights although the defendant lacked essential knowledge, contrary to the principles of law laid down in the Miranda and Escobedo cases.

Most of the decisions of the Courts of Appeal including the instant case where the question was briefed by petitioner have failed to consider the issue that the elements of psychological duress discussed in Miranda and Escobedo are likewise applicable to non-custodial interrogation. However, in United States v. Maius (supra), 378 F. 2d 716, the Sixth Circuit recognized that few citizens have the toughness of fiber or technical knowledge to refuse to answer in an interview but held that this was not duress or arrest in the legal sense.

The instant case is a failure to file case in which the Revenue Agent had knowledge of Petitioner's failure to

file and that he had substantial gross income to require filing before the matter was referred to the intelligence unit and the meeting of August 16, 1962. The interrogation as to why he failed to file could have nothing to do with a routine investigation.

If, therefore, the application of the Miranda-Escobedo rule should turn on the question of when the matter reaches the "accusatory" or "adversary" stage, this case is peculiarly adapted for consideration by this Court.

Since the opinion of the Court of Appeals in the instant case under Point B has indicated that the Miranda-Escobedo question is not squarely presented, Petitioner is compelled now to meet that issue. In its opinion the Court of Appeals held that the Trial Court could properly conclude that Mr. Kuehn, who attended the meeting of August 16, 1962 with Petitioner, attended that meeting in the capacity of attorney for Petitioner. The opinion admits, however, that the record did not positively demonstrate that Petitioner retained Kuehn as an attorney nor positively demonstrate he did not so retain him.

The only evidence that Kuehn was an attorney was the testimony of the Revenue Agent that shortly after July 29, 1961 (a year prior to the conference), Kuehn came to his office and discussed the returns and that "Kuehn said he was an attorney representing Mr. Frohmann" (Tr. 293). This testimony was obtained from the Revenue Agent in connection with other preliminary matters and before Petitioner's counsel had any knowledge of a meeting on August 16, 1962 or of any statement made by petitioner.

Petitioner did not hire Kuehn as a lawyer and the hearsay testimony of Agent Parker as to the hearsay statement of Kuehn to him a year prior to the meeting was not sufficient in probative value to establish his

agency as attorney for Petitioner. In United States v. Consolidated Laundries Corp. (2 Cir. 1961), 291 F. 2d 563, the opinion states at p. 576,

> "It is axiomatic that agency cannot be proved solely by the declarations of the alleged Agent, but must be established by independent proof. * * * The independent proof may be circumstantial but it must be 'substantial' (citing cases), and not too slight."

Certainly the testimony of the Revenue Agent as to what Kuehn told him, coming in by inadvertence on a different subject where it was not material does not meet the standard of proof for waiver of constitutional rights reiterated in Miranda v. Arizona, 384 U. S. at p. 475,

> "* * * This Court has always set high standards of proof for the waiver of constitutional rights * * *".

Petitioner knew Kuehn as a real estate man who prepared income tax returns and prepared Petitioners for all years commencing in 1950 (Tr. 475) and he gave Kuehn his records for 1959 and 1960 to prepare his returns (Tr. 487) and permission to deliver them to the Revenue Agent (Tr. 493). He also prepared and filed his late 1958 return in 1962 prior to the meeting in question.

The Eighth Circuit has held that the attorney client relationship is not established by hiring an attorney merely to prepare income tax returns. Canaday v. United States (8 Cir. 1966), 354 F. 2d 849.

Petitioner had no knowledge that he was under anything other than routine tax investigation and the presence of Kuehn at the meeting under the circumstances is service of a nature frequently, if not usually, performed by persons other than lawyers who assist taxpayers with their returns.

The Government interviewed and subpoenaed Kuehn to testify but the marshal returned and advised the Court

that Kuehn was approximately 86 years old and could not testify without danger to his health (Tr. 524, 525). During testimony of a witness, the Trial Court acknowledged that Kuehn was not competent to advise defendant in the preparation of tax returns (Tr. 411, 420). In fact, the record also reflects that petitioner hired others to represent him in legal matters (Tr. 208).

Even if Kuehn might be said to have acted as a lawyer for petitioner at the meeting of August 16, 1962 and was competent to do so, he could not have properly advised Petitioner without being informed himself as to the nature of the proceedings. His mere uninformed presence did not create a waiver of a basic constitutional right otherwise reserved to petitioner.

Also under point B. the opinion of the Court of Appeals mentions that there is no apparent inconsistency between petitioner's statement to the Special Agent and his testimony. This overlooks the holding of this Court in Miranda that the constitutional prohibition applies to exculpatory as well as inculpatory statements. Further, petitioner's alleged statement to the Agent that he did not file because he didn't have the money to pay the tax on its face was inconsistent with Government Exh. 51, Petitioner's bank ledger, introduced to show that he had funds on deposit (Tr. 257, 258, 259, 260).

Petitioner submits that the Escobedo-Miranda issue is properly before this Court for consideration of the issuance of a Writ of Certiorari.

II.

This case was tried by jury and petitioner contends he was substantially prejudiced by a combination of actions of the trial judge, including his rulings denying the introduction of certain evidence offered by defendant; certain

questions asked by the Court of defendant's witness Mueller; and by certain of the Court's comments during the examination of the witness Mueller.

That the trial court's actions may well be justified under existing practice is indicated by the support he received in the opinion of the Court of Appeals at points C. and D. For this reason, if there is merit to petitioner's contention, certiorari should be granted because of the importance of the question for the administration of criminal justice in the Federal Courts as in Kotteakos v. United States, 66 S. Ct. 1239 (1946).

> The trial Court properly instructed the jury that, "* * * mere laxity, careless disregard of the duty imposed by law, or even gross negligence, unattended by evil motive are not proof of a wilfull act on the part of the Defendant." (Tr. 557). United States v. Vitiello (3 Cir. 1966), 363 F. 2d 240.

Petitioner's excluded evidence includes (a) Defendant's Exhibits C, D and E, the Civil Court files of lawsuits against him summarized here in Appendix C, and (b) the proffered testimony of his accountant witness Mueller concerning his methods and computations used in preparing petitioners's 1960 tax return introduced in evidence by the Government. This latter testimony and the offers of proof and rulings of the Court rejecting the evidence as immaterial are contained in Tr. pp. 412 to 421.

The civil court's file exhibits reflect careless inattention by petitioner with final judgments taken against him by default in the total amount of approximately $37,000.00, and in Exhibit E a default pending only final inquiry in the approximate sum of $29,000.00.

These exhibits were offered in defense to show a pattern and habit of negligence by petitioner in other affairs of great importance to him which the jury in considering

his intent could compare with his failure to file tax returns, and also to meet the greatly emphasized Government evidence of petitioner's shrewdness and business acumen. In this habit of neglect undoubtedly lay the real cause of petitioner's tax problems as is further illustrated by his failure to have returns filed after he was contacted by a Revenue Agent only a few months after the 1960 return was due. It is difficult to conceive of more cogent and persuasive evidence in defense than that rejected by the trial court.

Similarly, petitioner sought to introduce evidence to show the methods and computations used in preparing his 1960 return to meet the Government's evidence that the petitioner had a substantial taxable income, although his return (introduced in evidence by the Government without limitation) showed a loss.

The effect of this evidence was to indicate to the jury a continuing design of petitioner to cheat the Government, which petitioner was not permitted to meet.

In its opinion, the Court of Appeals held the exclusion of all of the foregoing evidence to be within the Court's discretion as remote and irrelevant. This would appear to be in conflict with other decisions permitting the introduction of evidence to meet that of the other side though otherwise inadmissable. Hartman v. United States (8 Cir. 1954), 215 F. 2d 287; United States v. Lowe (3 Cir. 1956), 234 F. 2d 919.

Petitioner contends that all of the above evidence was admissible and essential to his defense. Considering this evidence in the context of the trial of the entire case, it should be noted that the testimony of the various Government witnesses concerning business transactions with petitioner were used by the Government as evidence of his business acumen affecting wilfulness. That the Court,

and undoubtedly the jury, were so impressed is illustrated by the comment of the Court outside the hearing of the jury during the Government's case in part, as follows (Tr. 155):

> "* * * a man who deals in business in this manner certainly should know that he has got to file a tax return".

Petitioner was repeatedly denied cross-examination of these Government witnesses to compare their orderly business practices with those of petitioner which would have demonstrated his lack of business acumen.

When considered in the context of the entire case, the refusal to admit the evidence and testimony here complained of effectively stripped petitioner of all evidence in his own behalf other than his own testimony, the truth of which the jury was instructed to consider in relation to petitioner's very grave interest in the case (Tr. 558).

Petitioner submits that under the circumstances, the discretion of the trial court on matters of evidence has been expanded to justify a curtailment which kept from the jury relevant and important facts critical to petitioner's defense, analogous to the rulings which this Court found sufficiently prejudicial to require reversal in Gordon v. United States (1952), 73 S. Ct. 369.

During the testimony of defendant's witness Certified Public Accountant Mueller, the Court interposed the following questions (Tr. 421):

> "The Court: Let me ask you another question, Mr. Mueller.
>
> The Witness: Yes, sir.
>
> The Court: Isn't it quite common for people who are not able to prepare a return to hire an accountant to do it?

The Witness: Yes, sir.

The Court: And when they don't have sufficient records to make a return, if they go to the Government and ask for an extension, can't they get all the time they need to get the records to make a return if they go timely?

The Witness: Usually; yes."

From the form of these questions, the trial Court indicated he considered petitioner's failure to hire an accountant or get an extension of time to be practically conclusive of his wilfulness, which certainly the jury might infer, and the Court thereby became a witness against petitioner expressing an opinion on the critical issue of the case. This the Court may not do. **Quercia v. United States** (1932), 289 U. S. 464. To have interposed an objection after the questions would have been futile to overcome the impression on the jury, and such questions constituted plain error under F. R. Cr. P. 52 (b), 28 U. S. C. A.

The witness Mueller was petitioner's only other witness on matters of substance other than petitioner. During the direct examination, the Court on at least five occasions indicated his impatience and desire to move the questioning rapidly along, on one occasion urging counsel to get the witness off the stand unless he had a question that the Court thought was material (Tr. 401, 405, 409). In general, the questions which were being asked concerned the preparation of the 1958, 1959 and 1960 returns, and the witness had been testifying only a very short time. The jury could not help but infer that the witness had absolutely nothing of value to offer.

This condition could only add to the prejudicial effect of reducing petitioner's defense to his own mere testimony.

In determining the prejudicial character of all of the matters complained of under this point II, they must be

considered in the light of the entire case in considering the effect upon the jury. The Government's case consisted of 38 witnesses and 66 exhibits, of which 60 were introduced in evidence (Tr. xiv) and the Government's case commenced at 2:00 p. m. on July 25, 1966, concluding at 12:15 p. m. on July 27, 1966 (Tr. 13, 374), whereas Appellant's case commenced at 1:30 p. m. on July 27, 1966 and concluded at 5:30 p. m. of the same afternoon (Tr. 374, 524).

The Government's case included testimony and documentary evidence in detail concerning petitioner's entire record of tax returns, assessments and payments covering the entire period 1950 through 1964 (Tr. 14, 15, 24, 25), including the showing that the tax returns for the years 1958 through 1964 and each of them were delinquently filed, which was made the most of in the Government's argument (Tr. 547). Petitioner's bank ledger for the entire period December, 1958 through February, 1962 was received in evidence over objection (Tr. 258, 259, 260).

In striking contrast to the above, the Court repeatedly limited petitioner's evidence in point of time to the periods concerning the 1959 and 1960 returns and the due dates thereof.

In many instances the actions of the trial Court in ruling on matters of procedure, cross-examination, admission of testimony and evidence, comments in the presence of the jury and questions of defendant's witness might each, standing alone, be generally within the latitude and discretion of the Court. But when, as here, such rulings are in marked contrast to the latitude permitted the Government and have the effect of eliminating independent evidence in defense and to meet the Government's evidence, and reduce the defense to the mere testimony of petitioner, then petitioner submits that the question may properly be considered as one for review by the Supreme Court to determine if such procedure is prejudicial.

III.

In United States v. Sullivan (1927), 274 U. S. 259, this Court held that although illegally received income must be reported, nevertheless 26 U. S. C., Sec. 7203 was constitutional since the taxpayer could claim the privilege against self-incrimination on the tax form required to be completed and filed.

More recently, in Costello v. United States (1966), 383 U. S. 942, Opinion 352 F. 2d 848, this Court granted certiorari to consider the question of the constitutionality of the Federal wagering tax statutes under the Fifth Amendment in connection with possible self-incrimination under criminal laws of the states.

The Sullivan case did not consider the requirement of Sec. 7203 requiring persons to "supply any information" required by the statute or regulations, which could now be a matter of public concern, in view of the ever increasing authority of administrative agencies. Furthermore, dissemination of tax returns is increasing and returns are available to the taxing authorities of the various states where there is no real control to prevent surreptitious use to initiate or aid in criminal investigations by state authorities.

Thus, the danger of self-incrimination of taxpayers in completing forms or supplying other information has substantially increased.

Further, if a taxpayer includes incriminating information in his return, he has essentially waived his constitutional privilege. The statute itself is a compulsion to furnish the incriminating information since taxpayers do not know that they may claim the privilege in preparing the form. It would seem that the standards for waiver of privilege laid down in Miranda v. Arizona (1966), 384 U. S. 436, have not been met.

The constitutionality of this section, therefore, may well be considered an important question of Federal law to be settled by this Court.

Petitioner wishes to advise the Court that this question of the constitutionality of 26 U. S. C., Sec. 7203, was not originally briefed to the Court of Appeals and was submitted to the Court of Appeals for the first time in petitioner's petition for rehearing.

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALBERT J. HALLER,
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JAMES Q. BROWN,
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September 22, 1967.

APPENDIX A.

Opinion of the Court Below.

United States Court of Appeals
For the Eighth Circuit.

No. 18,576

Jacob J. Frohmann, Appellant,
v.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[July 27, 1967.]

Before VOGEL, Chief Judge, and BLACKMUN and HEANEY, Circuit Judges.

BLACKMUN, Circuit Judge.

Jacob J. Frohmann, after a plea of not guilty, was tried in July 1966 and convicted by a jury on both counts of a two-count information charging him with violating 26 U. S. C., § 7203 in willfully failing to make federal income tax returns for the calendar years 1959 and 1960. Judge Meredith imposed a sentence of one year on each count and directed that the sentences be served concurrently. The defendant appeals.

Reversible error is alleged with respect to the admission of evidence, comment by the trial judge, and the re-

jection of evidence proffered by the defense. There is no claim that the evidence which was admitted was not sufficient to support the verdict.

In the years in question Frohmann was engaged in the business of developing and dealing in commercial real estate in the Saint Louis area. His federal income tax returns for the calendar years 1958-64, inclusive, were all delinquently filed. The 1958 return was filed in July 1962 after a revenue agent appeared on the scene. An amended return for that year and the returns for 1959-64, inclusive, were filed on December 11, 1965.

Frohmann does not deny that he had income sufficient to require him to file returns for 1959 and 1960 or that he failed to file those returns when they were due. He admitted this on direct examination.[1] He does deny that his failure to file was willful or with any intent to deprive the government of that to which it was entitled.

The defendant's tax difficulties center in the development and sale of a shopping center in Saint Charles, Missouri, dealings in options, the sale of an apartment, and rental from a bank building.

The government produced witnesses who testified as to the defendant's business activities and the amounts he received in various transactions. Some of these involved substantial figures. The government's evidence tended to show that the defendant's 1959 gross income was $55,502.41

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[1] Q. Let's go to the year 1959 and concerning the income tax for that year, or take them both together, 1959 and '60, can you tell the jury, and I want you to consider your answer to this question as best you recall, why you did not file the returns at the time that they were due for those years?

A. Well, I knew that they must be filed, that they had to be filed, but I didn't, couldn't do it in time. I just could not do it in time. But then I did not know that I might be charged criminally because of it. To me it was just something like a deed of trust or note that you owe. I mean if you are past due, well you owe additional interest and so on, but I didn't know that I would be charged as a criminal; no.

and his 1960 gross income was $36,522.50. The latter figure contrasts with a gross of over $24,000.00 but a net loss of $50,362.63 asserted by the defendant on his 1960 return as delinquently filed. This difference is due to variance in treatment of the apartment sale, and to a rental loss asserted by the defendant on the bank building but claimed by the government to be a corporate and not an individual transaction.

Some emphasis is placed on the defendant's background. He testified: He was born in Saint Louis in 1910. His parents were European immigrants who were uneducated and spoke little English. He attended school in this country through the fourth grade and then was taken to Europe and apprenticed in a dry goods store there for about five years. He returned to Saint Louis and finished the fifth grade when he was 16 years old. His elementary education was then discontinued and he went to barber school. After barbering for a time he became interested in real estate and, although he was never licensed, went to work as a salesman for real estate companies. In 1942 he started to work for himself. He operated out of his home until 1955 and then took desk space at a real estate office.

There is testimony that the defendant has been substantially blind in one eye since childhood, has been deaf in one ear since 1940, and has had cardiac disease since 1959.

Mr. Frohmann kept no books. His only records are papers relating to his real estate transactions.

A. The testimony of the witness Schneider and the court's refusal to grant a mistrial.

Edward C. Schneider, an attorney, was a witness called by the government. He testified that in the summer of 1959 he was retained by the defendant to represent him in connection with the acquisition of an apartment house

corporation. There were negotiations with the attorney for the seller as to the contents of the sale contract. The transaction was closed in a title insurance company office. On direct examination of Mr. Schneider, the following took place:

Q. Now subsequent to the exchange did you have a conversation with Mr. Frohmann relative to the property, the profits on it? Would that be correct?

A. No. I might say this, well, I will clarify it. My duty was at an end after I assigned the contract over to Mr. James and Effie James.

Q. To Mr. James and Effie James.

A. Then the closing end of the Jennings and West Pine took place after we had consummated. Now as far as the profit was concerned in dollars and cents, I would have no knowledge of that.

Q. Did you have any conversation with him relative to reporting that?

A. Well, I told him this: I was very certain——

Mr. Brown: Wait a minute. I am going to object to any statement he may have made. In the first place, there is no showing he was authorized to act in that capacity, and if he was, he was his attorney. I think counsel knows better than to ask a question like that.

At this point the jury was excused. At the bench the government offered to prove that, after the witness had completed his legal services for the defendant, he conversed with him and told him that, if he had gains from these transactions, they should be reported and "that he had better get himself an accountant and find out what had transpired". After the noon recess the government informed the court that it would not further pursue this line of questioning. The defense repeated its claim of privilege and moved for a mistrial. This motion was overruled but the court stated, "If you desire any special instruction at this time to the jury or later, I will give it".

No request for an instruction was made and no further question was asked of Mr. Schneider.

The defense claims that the quoted questions and answers show that the defendant could only have received advice from this attorney to report his profit and that this was particularly prejudicial because it was the only direct evidence of advice to the defendant as to the necessity of filing a return and thus seriously affected his defense of nonwillfulness.

We decide this issue against the defendant and do so because we perceive no prejudice. As we have noted, Frohmann himself testified on his direct examination, and thus told the jury, that he knew that a return had to be filed for 1959. Although this came later in the trial than the Schneider testimony, no claim is made that it was occasioned by that testimony or that Frohmann would not have so testified if Schneider had not said what he did. With the duty to file thus conceded, we fail to see how advice from Schneider as to the necessity for filing—if Schneider's answer can be regarded as stating that much—adds anything at all. Furthermore, our decision is fortified by the failure of the defense to proffer a curative instruction when the court offered to give one if it were desired, and by our awareness that the allowance of a mistrial motion is a matter for the trial court's discretion. *Evenson v. United States,* 316 F. 2d 94, 95-96 (8 Cir. 1963); *Dolan v. United States,* 218 F. 2d 454, 460 (8 Cir. 1955), cert. den. 349 U. S. 923. Certainly we do not find here the "clear and obvious abuse of a trial court's discretion" which alone justifies reversal. *Schaefer v. United States,* 265 F. 2d 750, 753 (8 Cir. 1959), cert. den. 361 U. S. 844.

B. The testimony of Revenue Agent Parker and the application of the *Escobedo* and *Miranda* rules.

Agent Parker testified that, in connection with his examination of the returns of a person with whom the de-

fendant had real estate transactions, he requisitioned the defendant's 1959 return; that this request was not productive; that he communicated with Frohmann and asked him to present the check with which he had paid his 1959 tax; that the defendant said he would do this but the check was not forthcoming; that shortly thereafter a man named Kuehn came to Parker's office and said he was an attorney representing Frohmann; that on many occasions in 1961 and in the first part of 1962 he asked the defendant for records to determine his income; that no records were produced; that in June or July of 1962 he went to Mr. Kuehn's residence and reviewed papers which the defendant had there; that this was done with the defendant's permission given to Mr. Kuehn; that in July Kuehn filed the 1958 delinquent return for the defendant; that on August 16, 1962, there was a conference in the Internal Revenue Service office attended by Kuehn, Frohmann, Parker and Special Agent Stieferman; that Stieferman there advised the defendant that he had a right not to answer any question; that Frohmann replied that he "did not intend to use that privilege, he would give us anything we wanted"; and, over objection, that the defendant stated that his returns were not filed "because he didn't have the money to pay the tax."

It is the admission of this last response which the defense now challenges. It is suggested that this is not entirely consistent with the defendant's own testimonial statement, set forth in the footnote, supra, as to the reasons for his delinquency.

Although conceding that the defendant was not in custody at the time this statement was made, the defense advances the principles of *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), and of *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and claims that these have application to this 1962 internal revenue service conference at which a special

agent was present and whose presence implied a criminal aspect to the investigation.

The government asserts that the defendant concededly was advised that he need not speak; that, however, he waived his right to remain silent; that, although he was not warned of his right to counsel, this fact is of no consequence because his own counsel, Kuehn, was present; and that, in any event, internal revenue agents in the investigatory phase of a case, and prior to custody, have the right to make inquiry of a taxpayer without the formalities which *Escobedo* and *Miranda* may now require for custody situations.

In response the defense argues that, although Mr. Kuehn was a lawyer, he was over 80 years of age and the record does not show that he was representing the defendant in a legal capacity as contrasted with acting as an accountant who prepared tax returns for him.

Whenever the question has been presented to a court of appeals, the court has refused to extend the *Escobedo* and *Miranda* requirement for the rendition of advice as to the right to counsel to the situation of a precustody internal revenue service inquiry. *Morgan* v. *United States,* ... F. 2d ..., 67-1 USTC par. 9449 (1 Cir. 1967); *Schlinsky* v. *United States,* ... F. 2d ..., 67-2 USTC par. 9493 (1 Cir. 1967); *Mathis* v. *United States,* 376 F. 2d 595 (5 Cir. 1967); *United States* v. *Maius,* ... F. 2d ..., 67-2 USTC, par. 9521 (6 Cir. 1967); *Kohatsu* v. *United States,* 351 F. 2d 898 (9 Cir. 1965), cert. den. 384 U. S. 1011; *Rickey* v. *United States,* 360 F. 2d 32 (9 Cir. 1966), cert. den. 385 U. S. 835; *Selinger* v. *Bigler,* ... F. 2d ..., 67-1 USTC par. 9420 (9 Cir. 1967), cert. applied for June 30, 1967. See *United States* v. *Spomar,* 339 F. 2d 941 (7 Cir. 1964), cert. den. 380 U. S. 975. The great majority of unappealed district court cases in which the question has arisen are to the same effect. *Bohrod* v. *United States,* 248 F.

Supp. 559, 564-66 (W. D. Wis. 1965); *Smith* v. *United States,* 250 F. Supp. 803 (D. N. J. 1966); *United States* v. *Fiore,* 258 F. Supp. 435 (W. D. Pa. 1966); *United States* v. *Hill,* 260 F. Supp. 139 (S. D. Cal. 1966); *United States v. Carlson,* 260 F. Supp. 423 (E. D. N. Y. 1966); *United States* v. *Spinney,* 264 F. Supp. 774 (D. Mass. 1966); *Stern* v. *Robinson,* 67-1 USTC par. 9295 (W. D. Tenn. 1966); *United States v. Gleason,* 265 F. Supp. 880, 883 (S. D. N. Y. 1967); *United States* v. *Neves,* 67-1 USTC par. 9412 (S. D. N. Y. 1967); *United States v. Rabin,* 67-1 USTC par. 9465 (S. D. N. Y. 1967).

To the contrary, seemingly, are only *United States* v. *Turzynski,* 67-2 USTC, par. 9489 (N. D. Ill. 1967); *United States* v. *Kingry,* 67-1 USTC par. 9262, 19 AFTR 2d 762 (N. D. Fla. 1967); and *United States* v. *Schoenburg,* 67-1 USTC par. 9393 (D. Ariz. 1965). See *United States* v. *Harrison,* 67-1 USTC par. 9222 (S. D. N. Y. 1967). But Mr. Justice Douglas dissented from the denial of certiorari in *Thomas* v. *United States,* 386 U. S. 975 (1967), with the observation that, "This is not an in-custody case, but it is a coercive examination of a taxpayer at a critical preliminary hearing, so to speak, and the question presented apparently is a recurring one".

All these cited cases have been decided since *Escobedo* and many of them since *Miranda.* Their facts, of course, vary. It is clear, however, in a number of them, that the internal revenue service review had reached the stage where a special or intelligence agent was in the case and was present at the conference.

For us, the majority authorities comprise an impressive list and we would be loathe to oppose them.

The present case, however, is not without its other features and we may therefore regard the *Escobedo-Miranda* issue, and the question of the extension of the

"custodial interrogation" language, p. 444 of 384 U. S., to noncustodial internal revenue service conferences, as one not squarely presented to us here.

It is not disputed that Mr. Kuehn was a lawyer. Although the record may not positively demonstrate that the defendant retained him as an attorney, neither does it positively demonstrate that the defendant retained him only in a capacity other than legal. Agent Parker testified that Mr. Kuehn told him that he was the defendant's lawyer. And he did prepare the first 1958 return for the defendant filed in July 1962 (as well as his returns for earlier years). He thus performed services which, in the delinquency atmosphere of this case, certainly had legal overtines. We feel that the court could properly conclude that Mr. Kuehn was acting in the capacity of attorney for Mr. Frohmann at the time of the conference on August 16, 1962, when the challenged statement was made. Any basis for a claim of deprival of advice as to the right to counsel thus evaporates. We are not satisfied, either, that this record shows that the investigation had attained what is to be described as the accusatory stage or that there is any significantly apparent inconsistency in the defendant's testimony.

In summary, the factual situation here falls far short of what has been determined to be of constitutional magnitude in *Escobedo* and *Miranda* and which was persuasive upon the Supreme Court in those cases.

C. Comments by the court.

The comments by the court, which the defense claims were influential upon the jury and prejudicial, were made during the examination of witness Lewis A. Mueller, a certified public accountant employed by the defendant to prepare his delinquent returns. Mr. Mueller was hired, at

the suggestion of counsel, in late 1963 to set up the records for a shopping center. He became aware of the defendant's personal income tax problems in early 1965. On direct examination Mr. Mueller was questioned about the difficulties he incurred in getting detailed information for the preparation of the returns and about the incomplete and uninformative nature of the initial 1958 return prepared by Mr. Kuehn and filed in 1962. The court indicated general agreement with government objections that what happened in 1965 or in 1962 was not material to the issue and that the year 1958 was not the subject of charges against the defendant and, on occasion, itself asked questions of the witness.

The defense complaint here is that the trial court demonstrated impatience to get Mr. Mueller off the stand, indicated that it thought his testimony to be of little importance, and, by its own questions, showed that it considered the defendant's failure to obtain assistance or an extension of time for filing as indicative of willfulness.

No objection based on the court's demeanor or alleged influence was made during the trial. In its instructions the court told the jury that it meant to express no opinion and that it was for the jury and not the court to determine facts.

We have carefully read witnesses Mueller's entire examination and we do not at all agree with the defense's characterization of the trial court's actions. For the most part, the information elicited from the witness eventually came in anyway. It may be that one engaged in the defense of the suit might find himself inclined to believe that the court is becoming impatient. We find nothing here, however, which is any different from what takes place in any lawsuit where the trial judge has ruled as to the limits of testimony and is consistently confining counsel to those limits. The court, it seems to us, was doing no

more than maintaining a normal and fairly tight rein on a tax case in order to keep it moving along and to prevent its being bogged down in statistical detail of questionable pertinency upon the real issue, namely, the defendant's state of mind as to the filing of returns for 1959 and 1960 when they were due.

There is nothing here which can be characterized as abusive or unfair or which approaches plain error as contemplated by Rule 52 (b), Fed. R. Crim. P.

D. The exclusion of evidence offered by the defense.

This was of three types: (1) the files of three state court cases (in one of which defendant had counsel of record) in which default judgments were obtained against the defendant in 1962, 1963 and 1964 in amounts exceeding $65,000.00 in the aggregate; (2) income tax computations made by Mr. Mueller for the defendant for 1959 and 1960 which would show a loss for 1960 entitling the defendant to the benefit of a net loss carryback, under § 172 of the Internal Revenue Code of 1954, as amended, 26 U. S. C., § 172, to prior tax years, a benefit which the defendant by his failure to file did not claim, and (3) the delay of the Internal Revenue Service for more than a year in furnishing a duly requested Form 899 for the defendant. This form is a record of a taxpayer's returns, assessments and payments. It was eventually produced here only 11 days prior to trial. The defense asserts that the evidence in the first two categories tended to show the defendant's incapacity and an absence of willfulness on his part, and that the evidence in the third category demonstrated that the government does not adhere to its own standards, and tended to impeach the testimony of revenue agents who said they had no bias against the defendant.

We perceive no prejudicial error. The delay in the furnishing of Form 899 has no bearing, apparent to us,

upon the issue of willfulness and we see no prejudice, nor is any claimed, in the delay. The defense had the form and the information it disclosed for several days prior to trial. The state court files and the Mueller computations perhaps could have been admitted, but there are limits to what may be considered as reasonably connected. This type of material, in our view, clearly falls within the broad area of the trial court's discretion as to materiality or relevancy. See *Cotton v. United States,* 361 F. 2d 673, 676 (8 Cir. 1966); *Clark v. United States,* 211 F. 2d 100, 105 (8 Cir. 1954), cert. den. 348 U. S. 911; *Wilson v. United States,* 250 F. 2d 312, 325-26 (9 Cir. 1957). We find no abuse in the court's rejection of the evidence on the ground of remoteness and irrelevancy and, indeed, we agree with the court's rulings.

We do not hesitate to say in conclusion that this case strikes us as a weak one for the defense. It is easy to understand why a jury, itself composed of taxpayers, would not be persuaded by the explanation for nonfiling which Mr. Frohmann offered. The case is reminiscent of *Sansone v. United States,* 334 F. 2d 287 (8 Cir. 1964), aff'd. 380 U. S. 343 (1965). It has, of course, its tragic aspects, as most income tax criminal cases do, but we are not prepared to say that this record discloses or even intimates that it was tainted with prejudicial error.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Crim.

Judgment.

(Filed July 27, 1967, Robert C. Tucker, Clerk.)

United States Court of Appeals
for the Eighth Circuit.

No. 18576. September Term, 1966.

Jacob J. Frohmann, Appellant,

vs.

United States of America.

Appeal From the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Jacob J. Frohmann, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the District Court.

Order entered in accordance with opinion.

Clerk, U. S. Court of Appeals, 8th Circuit.

APPENDIX B.

Order Denying Petition for Rehearing Below.

United States Court of Appeals
for the Eighth Circuit.

No. 18576.

Jacob J. Frohmann, Appellant, vs. United States of America.	Appeal from the United States District Court for the Eastern District of Missouri.

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

August 24, 1967.

APPENDIX C.

Summary of Petitioner's Exhibits Rejected.

Defendant's Exhibit C.

Official Court file of the St. Louis County, Missouri, Circuit Court, Cause No. 257799 styled Laclede Gas Company v. Jacob J. Frohmann.

Suit on a note for $3,000.00 plus interest and attorney's fees filed January 9, 1964 with personal service. Although previously notified by letter of plaintiff's attorney, a default judgment was entered on October 6, 1964 against defendant for $3,000.00 plus 10% attorney's fees, interest and costs.

Defendant's Exhibit D.

Official Court file of the St. Louis County, Missouri, Circuit Court No. 50821. B. J. Investment Company, Inc. v. Jacob J. Frohmann, and others.

Suit on deficiency on secured note dated March 31, 1960. Suit for $28,751.65 plus interest. Filed June 21, 1962 with personal service. The file reflects one default and inquiry against defendant October 21, 1962, later vacated when defendant (petitioner) obtained a lawyer. Subsequently, on March 30, 1964 a Summary judgment was granted against defendant, Frohmann, who failed to appear in person or by attorney, such judgment being in the amount of $33,517.22.

Defendant's Exhibit E.

Official Court file of the St. Louis County, Missouri, Circuit Court No. 249501, Rathert, et al. v. Jacob J. Frohmann, et al.

Suit in four counts on separate agreements in the amounts of $21,500.00, $4,670.00, $3,000.00 and $833.34,

respectively. Suit was filed October 10, 1962. The file shows that since defendant entered no appearance, a default and inquiry was granted November 23, 1962, although the final inquiry was continued from time to time with defendant being notified by letter of plaintiff's attorney of setting. On September 10, 1963 attorneys entered their appearance for defendant. The file shows a copy of a letter from defendant's attorneys in March, 1964 to defendant advising they would withdraw since defendant had not communicated with them. On October 16, 1964 defendant's counsel did withdraw.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 644

JACOB J. FROHMANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

A jury convicted petitioner of wilfully failing to file income tax returns for 1959 and 1960 in violation of Section 7203 of the Internal Revenue Code of 1954. He was sentenced to imprisonment for one year on each count to run concurrently. (Pet. 2.)

The evidence showed that petitioner's gross income from his business of developing and dealing in commercial real estate properties (Pet. 5) was $55,502.41 in 1959 and $36,522.50 in 1960 (Tr. 343–345). Prior to 1958 petitioner filed timely income tax returns (Tr. 487). His 1958 return, however, was not filed until 1962, after he had been contacted by a revenue agent (Tr. 515–516). His returns for 1959 and 1960 were not filed until December 11, 1965 (Tr. 14–15).

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Petitioner conceded at the trial that he had known the returns should be filed, but testified that he "just couldn't do it in time" and had not known that he could be prosecuted criminally (Pet. 22, fn. 1). The evidence also showed that petitioner in 1962 told a special agent that he had failed to file his returns because he did not have the money to pay the tax (Tr. 296–299).

Petitioner's principal contention is that admission of his 1962 statement violated his constitutional rights because he was not advised at the 1962 meeting of his right to counsel. There is no merit to this claim, or to petitioner's attacks on various of the trial court's rulings and on the constitutionality of 26 U.S.C. 7203. No further review of his conviction is justified.

1. *Miranda* v. *Arizona,* 384 U.S. 436, and *Escobedo* v. *Illinois,* 378 U.S. 478, do not require exclusion of petitioner's 1962 statements. The record shows that an attorney, Mr. Kuehn, accompanied petitioner to his 1962 meeting with the special agent. Petitioner's attendance at the meeting was wholly voluntary; no contrary claim is made. The agent advised petitioner that "he had a right not to answer any questions, if he so desired". Petitioner replied that he "did not intend to use that privilege" and would give the agents "anything [they] wanted" (Tr. 299).

Petitioner claims (Pet. 10–12) that Mr. Kuehn, although a member of the bar, was not competent to act as an attorney, and was not in fact petitioner's counsel. But Mr. Kuehn had previously told the agent that he was petitioner's attorney, and his activities were consistent with such a status. We submit

that in these circumstances *Escobedo* and *Miranda* would not require a warning even if the interview had taken place while petitioner was in custody.

But petitioner, when interviewed in 1962, plainly was not in custody, or deprived of his freedom in any way. Therefore, whatever Mr. Kuehn's capacity was, petitioner was not subject to the type of compulsion that the rules of *Miranda* and *Escobedo* were designed to prevent, and no warning was required. The courts of appeals in six other circuits are in accord. *Schlinsky* v. *United States,* decided June 6, 1967, 19 A.F.T.R. 2d 1597 (C.A. 1), certiorari denied, No. 436, this Term; *United States* v. *Mancuso,* 378 F. 2d 612, 619 (C.A. 4), reargued *en banc* October 4, 1967; *Thomas* v. *United States,* 370 F. 2d 96 (C.A. 5), certiorari denied, 386 U.S. 975;[1] *United States* v. *Maius,* 378 F. 2d 716, 718–719 (C.A. 6), certiorari denied, No. 372, this Term; *United States* v. *Mansfield,* decided July 26, 1967, 20 A.F.T.R. 2d 5233 (C.A. 7), petition for certiorari pending, No. 723, this Term; *Kohatsu* v. *United States,* 351 F. 2d 898 (C.A. 9), certiorari denied, 384 U.S. 1011.[2]

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[1] Although this issue is not discussed in the Fifth Circuit's *per curiam* opinion, it is evident from Mr. Justice Douglas' dissent from the denial of certiorari in *Thomas* that the question was raised in the case. Cf. *Evans* v. *United States,* 377 F. 2d 535 (C.A. 5).

[2] *United States* v. *Kingry* (N.D. Fla.), 19 A.F.T.R. 2d 762, and *United States* v. *Turzynski* (N.D. Ill.), 20 A.F.T.R. 2d 5004, on which petitioner relies (Pet. 8), have been discredited by court of appeals' decisions in their respective circuits. The weight of district court opinions agrees with the views expressed in the courts of appeals. See *United States* v. *Gleason,* 265 F. Supp. 880 (S.D. N.Y.); *United States* v. *Fiore,* 258 F.

2. Petitioner's contention (Pet. 12–17) that he was deprived of a fair trial is based on three separate actions of the court during trial. First, it is said (Pet. 13–14) that the trial judge erred in excluding evidence that substantial default judgments had been entered against petitioner. The relevance is said to be that this tended to show "a pattern and habit of negligence by petitioner in other affairs of great importance to him" (Pet. 13), thus, presumably, showing a want of wilfulness. The connection is tenuous at best. The trial court found the evidence remote and irrelevant, and the court of appeals agreed (Pet. 32). There is no basis for further review of the trial court's discretionary authority to determine what evidence is sufficiently pertinent to be admissible. See, *e.g.*, *Cotton* v. *United States,* 361 F. 2d 673, 676 (C.A. 8); *Wilson* v. *United States,* 250 F. 2d 312, 325 (C.A. 9).

Nor was it error, as petitioners claim (Pet. 14), to exclude evidence of the methods and computations used in preparing petitioner's 1960 return. The purpose of the evidence was to show that petitioner had a loss instead of a profit for that year. But whether it was a profit or loss would not be relevant to the question of whether petitioner had sufficient gross income to require the filing of the return. See 26

Supp. 435, 440 (W.D. Pa.); *United States* v. *Hill*, 260 F. Supp. 139 (S.D. Cal.); *United States* v. *Carlson*, 260 F. Supp. 423 (E.D. N.Y.); *Moon* v. *Brennan* (E.D. Wis.), decided November 21, 1966, 19 A.F.T.R. 2d 641; *Stern* v. *Robinson*, 262 F. Supp. 13 (W.D. Tenn.); *United States* v. *Bachman*, 267 F. Supp. 593 (W.D. Pa.); *United States* v. *Neves* (S.D. N.Y.), decided April 28, 1967, 67–1 USTC, par 9412; *United States* v. *Basil*, 268 F. Supp. 1018 (S. Fla.); *United States* v. *Bohrod* (W.D. Wis.), decided December 14, 1965, 67–2 USTC, par. 9622.

U.S.C. 6012(a)(2). At most, therefore, the admissibility of the evidence was a matter for the trial court's discretion, *Cotton* v. *United States, supra,* and no abuse is shown. Moreover, this contention goes only to Count II—relating to 1960—and even if the conviction on that count were reversed the sentence would still be fully supported by the judgment on Count I.

The third objection is to two questions that the trial judge asked a witness, an accountant who had done work for petitioner (Pet. 15–16). The trial court's purpose was to bring out that taxpayers may hire accountants to prepare their returns and may get extensions of time, when needed, for filing. The judge did not thereby become "a witness against petitioner expressing an opinion on the critical issue of the case" (Pet. 16). As the court of appeals noted, "For the most part the information elicited from the witness eventually came in anyway" (Pet. 30). In addition, the trial court instructed the jurors that if they thought, at any time during the trial, that the court indicated any opinion with respect to the facts, they should disregard it because such was not the court's purpose; and that any opinion the court might have was not conclusive on the jury, which was "at perfect liberty to disregard anything of this sort" (Tr. 550–551).

3. Petitioner's final argument is that 26 U.S.C. 7203 is unconstitutional on its face. This claim, made for the first time on a petition for rehearing in the court of appeals (Pet. 19), is in substance a call for reconsideration and overruling of *United States* v. *Sullivan,* 274 U.S. 259.

Petitioner was convicted under that part of the statute which makes unlawful a wilful failure "to make a return" required by the Internal Revenue Code. Sullivan had been convicted of the same crime. He claimed that the Fifth Amendment proscription of compelled self-incrimination protected his failure to file, because filing might have disclosed that his income resulted from unlawful activity. This Court rejected the contention for two reasons (*Albertson* v. *SACB,* 382 U.S. 70, 79):

> *first,* that a self-incrimination claim against every question on the tax return, or based on the mere submission of the return, would be virtually frivolous, and *second,* that to honor the claim of privilege not asserted at the time the return was due would make the taxpayer rather than a tribunal the final arbiter of the merits of the claim. * * *

Here, the claim of the Fifth Amendment right is even more frivolous, for there is no suggestion in the record, or for that matter any claim, that the answer to any question on the return could have incriminated petitioner in any way. Further, just as Sullivan did, petitioner claims a right to make himself, rather than a tribunal, judge of the merits of his claims to constitutional protection.

There is nothing in petitioner's assertion that the grant of certiorari in *Costello* v. *United States,* 383 U.S. 942, No. 3, this Term, should prompt a reconsideration of *Sullivan.* The issues there and in the associated cases of *Marchetti* v. *United States,* No. 2, this Term, and *Grosso* v. *United States,* No. 12, this

Term, are whether the registration and payment requirements of the wagering tax laws violate the Fifth Amendment. The argument is that those requirements compel an admission that a person received income from wagering—an activity unlawful under State law. In *Sullivan,* as well as here, an income tax return could have been filed without identifying the source of income.[3]

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

OCTOBER 1967.

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[3] Petitioner was not convicted under the portion of Section 7203 that he quotes (Pet. 18), which makes unlawful a failure to "supply any information" required by the Internal Revenue Code. We presume, as was said in *Sullivan,* "[i]f the form of the return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all." 274 U.S. at 263.

U.S. GOVERNMENT PRINTING OFFICE: 1967